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Supreme Court of the United States

No. 897 50

J. E. RILEY INVESTMENT COMPANY, *Petitioner*,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

ROBERT ASH,
W. J. SEBALD,
Munsey Building,
Washington, D. C.
Attorneys for Petitioner.

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Certiorari is requested in this case principally on the ground that the decision below is in direct, obvious, and authoritatively recognized conflict with *Mead Coal Co.* v. *Commissioner*, (C. C. A. 4) 106 F. (2d) 388.

The Fourth Circuit in the *Mead* case held that an election to take a percentage depletion deduction for 1934 under Section 114 (b) (4) of the Revenue Act of 1934 **was valid** and effective if made in an amended return filed February 6, 1936.

In the case at bar the Ninth Circuit held that an election to take a percentage depletion deduction for 1934 under Section 114 (b) (4) of the Revenue Act of 1934 **was not valid** and, therefore, not effective if made in an amended return mailed to the Collector February 8, 1936.

Loose-leaf tax services are the accepted and established authority on questions of taxation. The Prentice-Hall Fed-

eral Tax Service and the Alexander Federal Tax Service have recognized and commented editorially on the conflict between the case at bar and the *Mead* case.

At ¶2375, the Alexander Service states:

> "In the view of the conflict between the Fourth and Ninth Circuits and the dissent, the issue cannot be regarded as finally settled."[1]

Prentice-Hall specifically states the existence of conflict at ¶62,334 and ¶62,514, and on Executive page 68,062. The discussion on page 68,062 concludes:

> "It is likely that this question will now be taken to the Supreme Court on the ground of conflict with a decision of the C. C. A. 4th Circuit."

We submit that the foregoing completely refutes the Government's statement (Br. p. 6) that:

> "The conflict between this decision and the *Mead* decision is, therefore, only on the narrow issue of when an amendment must be filed in order to be timely."

The Government in its brief, (page 6) does admit that, in the case at bar, the question of the timeliness of the amended return "was not directly presented or decided".[2]

In any event, the amendment in the case at bar was as "timely" as the amendment in the *Mead* case.

In the *Mead* case the amended return was filed February 6, 1936. In the case at bar the amended return was mailed February 8, 1936, (R. 4, 13) although in August, 1935, a Revenue Agent advised the taxpayer it was entitled to the percentage depletion deduction and made a report accordingly. (R. 21)

The Government's brief states that the issue of the timeliness of the amended return has been settled by *Haggar*

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[1] See also ¶2144 Alexander Tax Service.

[2] The failure of the respondent to raise the question of the timeliness of the amended return is the basis of Judge Mathews' dissent herein. (R. 58)

Co. v. *Helvering,* No. 176, present term. Although petitioner does not admit the conflict is limited as respondent contends, it is obvious that the *Haggar* decision does not control.

The *Haggar* case involved a statute providing for a tax on the adjusted declared value of the capital stock of corporations.[3]

It specifically provided:

> "* * * the adjusted declared value shall be the value, as declared by the corporation in its first return under this section (*which declaration of value cannot be amended*) * * *." (Italics supplied)

The section quoted is part of the same 1934 Act involved in the case at bar. It was enacted in the light of the known interpretation of the taxing acts permitting amendments to returns to show proper items of income and deductions. If the Congress, which enacted the capital stock tax law, meant the same rule to apply to the depletion section as to the capital stock tax section, it would have specifically so stated in the statute.

Question is Important

The question is important and the conflict should be resolved to relieve the Board of Tax Appeals and the Courts of the burden of considering cases of this nature. At the present time, at least three cases involving Section 114 (b) (4) of the 1934 Revenue Act are pending before Circuit Courts of Appeal on appeal from the Board of Tax Appeals[4] and at least one such case has been decided by a Circuit Court.[5] Counsel is advised that other cases involv-

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[3] Section 701, Revenue Act of 1934.

[4] *Walter C. Hill,* et al., 41 B. T. A #38 (¶64,220 P-H), appealed to Sixth Circuit. *Kehoe-Berge Coal Co.,* 41 B. T. A. #45 (¶64,227 P-H), and *Pittston-Duryea Coal Co.,* Memo B. T. A. Opinion, Feb. 7, 1940 (¶64,292 P-H), appealed to Third Circuit.

[5] The *Commodore Mining Co.* v. *Commissioner,* affirming 40 B. T. A. 347, #61. Decided March 20, 1940 (C. C. A. 10), (¶62,534 P-H).

ing the section are pending in various divisions of the Bureau of Internal Revenue. Action on those cases can only result in litigation.

Amended Returns Have Always Been Accepted and Have Always Been Construed as Amendments or Supplements to Original Return.

There is no statutory authority for amended returns. However, as long ago as O. D. 113, C. B. 1919, p. 234, the Commissioner ruled:

> "A corporation may submit amended returns for previous years when through wrong accounting practice capital charges have been made to income."

To the same effect see Mim. 2207 C. B. 1919, p. 221; I. T. 1450, C. B. Dec. 1922, p. 200, and Articles 36 and 111 of Regulations 45 under the 1918 Act.

Courts have uniformly held that amended returns may be filed to show correct items of income and deductions. This is true even where the first return constituted an 'election'. In *Lucas* v. *Sterling Oil & Gas. Co.*, 62 F. (2d) 951, (C. C. A. 6), the taxpayer, under Treasury Regulations, had the option of charging certain expenditures in connection with oil and gas wells to capital or treating them as operating expense. An election, once made, was to control for all subsequent years. Taxpayer's original return for 1919 capitalized such expenditures. After other facts had been ascertained the taxpayer, February 10, 1921, filed an amended return which treated the expenditures as operating expenses. On neither return was a tax due. The 1920 return again treated such expenditures as operating expenses. Upon audit of the 1920 return the Commissioner ruled the expenditures for that year must be capitalized as the taxpayer had so elected in the 1919 return. The Court states (p. 951):

> "There is no statutory authority for amended returns, but it is well known that the Treasury Department

both in practice and by regulation (Articles 36 and 111 of Regulations 45) has been liberal in authorizing and accepting such returns."

The Court states that, after learning certain profits for 1919 should have been reported for that year, the taxpayer filed an amended return (p. 952):

> "This seems to us to constitute the first instance of a mature and deliberate choice by the appellee, based upon knowledge of all the material facts * * * and, in view of the effect of an election upon future returns, we do not think that such election should be held to be effected, unless based upon knowledge of this kind as indicative of a final and deliberate choice. * * * and where the initial return is filed upon incomplete knowledge of the material facts, and before the filing of a return for the subsequent year, the taxpayer ascertains other pertinent facts and files an amended return disclosing them, it seems to us that the initial return may properly be regarded as tentative in its nature, and as not constituting an election. In such case, the taxpayer should be permitted to do what he had the right to do in the first instance."[6]

The Government's brief in opposition relies heavily on *Pacific National Co.* v. *Welch*, 304 U. S. 191. This Court in that case specifically points out that an amended return cannot be filed to change the *method* of reporting income, as from a completed transaction method to an installment method. It did not decide there was error in the established law and administrative practice that amended returns are proper to show correct items of income or deduction.

It is common knowledge that thousands of amended returns are filed every year. To accept the contention of

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[6] The *Sterling Oil* case refutes respondent's statement (Br. p. 7) that "no statutory provision, or practice supports the view that an amended return is timely if filed before the time for the filing of the return for the next year".

the Department of Justice that amended returns are proper and effective only if filed within the time permitted for filing the first form, could very easily result in unlimited confusion and difficulty in the administration of the taxing laws.

Conclusion

A conflict exists which results in confusion and uncertainty. Certiorari should issue.

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Munsey Building,
Washington, D. C.
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